Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-7–02 OF 2018(W)
RAMLY ALI, AZAHAR MOHAMED, ROHANA YUSUF, ZAWAWI SALLEH FCJJ AND ABANG ISKANDAR JCA
31 OCTOBER 2018

Arbitration — Award — Setting aside — Whether Court of Appeal applied wrong test for intervention — Whether award made in excess of jurisdiction — Whether award in breach of public policy and/or natural justice under s 37 of the Arbitration Act 2005 — Arbitration Act 2005 s 37

This appeal by the appellants was against the decision of the Court of Appeal dated 24 October 2017 dismissing their appeal relating to their application to set aside an arbitral award pursuant to s 37 of the Arbitration Act 2005 ('the AA 2005'). Jan De Nul (M) Sdn Bhd ('JDN') was a private company limited by share, incorporated in Malaysia; and Jan De Nul Group (Sofidra SA) ('Sofidra'), was the ultimate holding company of JDN, incorporated in Luxembourg. Central Malaysian Properties Sdn Bhd ('CMP') was a private company limited by share, incorporated in Malaysia; and Vincent Tan, was a substantial shareholder having a controlling stake in CMP. CMP was the developer of a project for reclamation of land ('the project'). CMP awarded the project to JDN for its construction. Sofidra was the guarantor guaranteeing the due performance by JDN of its obligations. The relevant contract was executed by the parties on 23 March 2010. Works could not start as planned due to CMP's delay in meeting its initial financial and payment security obligation. Works only started on 8 October 2010 after Vincent Tan executed a guarantee agreement in his personal capacity, guaranteeing the due and functual performance by CMP of its obligations under the contract. By the end of October 2010, CMP was again in default of payment under the contract. Unfortunately, on 12 November 2010 much of the reclaimed platform gave way and moved southwards resulting among other, in the loss of one life ('the RFI disaster'). On 16 November 2010, JDN issued a notice notifying CMP that it had defaulted in its payment progress. CMP failed to remedy the default. On 2 December 2010 JDN terminated the contract. On 12 August 2011 JDN and Sofidra proceeded to refer the dispute to arbitration. An arbitral tribunal was constituted on 31 January 2012 ('the tribunal') and the parties proceeded with the arbitral proceedings. CMP and Vincent Tan filed their counterclaim against JDN in the arbitral proceedings. On 3 September 2015, after hearing the parties, the tribunal delivered an award ('the award'), and held, inter alia, that: (a) JDN validly terminated the contract; (b) JDN was responsible for the

RFI disaster; (c) JDN and Sofidra were ordered jointly and severally to pay CMP the sum of RM2,789,383.57 in respect of CMP's counterclaim with 5% interest from the date of the award until the date of payment; and (d) each party shall bear equally all the fees and expenses by the KLRCA and the arbitral tribunal. On 23 December 2015, JDN and Sofidra filed an originating summons under s 37 of the AA 2005 to set aside part of the award which allowed CMP's counterclaim. After hearing the parties, the High Court upheld the decision of the tribunal and dismissed JDN's and Sofidra's application. Dissatisfied with the dismissal of their application, JDN and Sofidra filed an appeal to the Court of Appeal. The Court of Appeal dismissed the appeal and ruled that it was not a fit and proper case for judicial intervention to set aside the award under s 37 of the AA 2005. Leave to appeal to the Federal Court was granted to JDN and Sofidra on the question of whether as a matter of law the Court of Appeal was correct in ruling that the test for the intervention of the court under s 37 of the AA 2005 as 'one where the award suffer from patent injustice and/or where the award is manifestly unlawful and unconscionable'. The issues for consideration were: (i) whether the award was made in excess of jurisdiction; and (ii) whether the award was in breach of public policy and/or natural justice under s 37(1)(b)(ii) and s 37(2)(b)(ii) of the AA 2005.

Held, dismissing the appeal and affirming the order of the Court of Appeal:

(1) The tribunal had determined the legal implication of the contract on JDN's responsibilities, with particular reference to cl 7.2(a) of the conditions of contract. JDN's contention on the issue of excess of jurisdiction under s 37(1)(a)(v) of the AA 2005 was baseless (see para 42).

(2) The tribunal had made a detailed analysis of the parties' obligations from the perspective of risk allocation based on the evidence made available before it before coming to the conclusion that JDN had breached its obligations to execute the works with due care and skill as required under the contract. That finding by the tribunal was neither contrary to nor did inconsistent with the evidence adduced at the hearing. The parties had sufficiently raised all the relevant issues in their respective pleadings. The tribunal was certainly entitled to come to its considered conclusion after hearing the parties that JDN had breached its obligations under the contract after detailed examination of the relevant clauses in the contract where the parties had apportioned the risks involved in the scope of the works. The complaint as alleged by JDN had failed to meet the requirements to prove that the tribunal had conducted the proceedings and issued the award in breach of the rules of natural justice. JDN had not sufficiently particularised the complaint recognisable under the AA 2005 (see paras 44–46).

(3) There was nothing to show that the Court of Appeal had dismissed JDN's and Sofidra's appeal on the ground that they had failed in the test of

'patent injustice' and/or 'manifestly unlawful and unconscionable'. Instead, the appeal was dismissed by the Court of Appeal on the ground that after reading the appeal records and submissions of learned counsels, the court did not think it was a fit and proper case for judicial intervention to set aside the award. The Court of Appeal had not made any affirmative ruling to apply the test for intervention of the court under s 37 of the AA 2005 and therefore the present court would not be in the position to give an answer to the question posed (see paras 67–68).

(4) The learned High Court judge had made a correct finding that the tribunal had not strayed from the pleaded case of the parties in their submissions to the arbitration and had not gone beyond the submissions of the parties. Therefore JDN's and Sofidra's contentions on the issue under s 37(1)(a)(v) of the AA 2005 to support their appeal was correctly dismissed. The Court of Appeal had correctly affirmed the decision. The learned High Court judge had also correctly found that JDN and Sofidra had failed to establish their case on a breach of natural justice and that the award made by the arbitral award was in conflict with the public policy of Malaysia under s 37(1)(b)(ii) and 37(2)(b)(ii) of the AA 2005 (see paras 69–70).

[Bahasa Malaysia summary

Rayuan ini adalah oleh perayu adalah terhadap keputusan Mahkamah Rayuan bertarikh 24 Oktober 2017 yang menolak rayuan mereka berkaitan dengan permohonan mereka untuk mengetepikan satu award timbang tara menurut s 37 Akta Timbang Tara 2005 ('Akta'). Jan De Nul (M) Sdn Bhd ('JDN') adalah sebuah syarikat swasta terhad menurut saham, diperbadankan di Malaysia; dan Jan De Nul Group (Sofidra SA) ('Sofidra'), adalah syarikat induk utama JDN, yang diperbadankan di Luxembourg. Central Malaysian Properties Sdn Bhd ('CMP') adalah syarikat swasta terhad menurut saham, diperbadankan di Malaysia; dan Vincent Tan, adalah pemegang saham utama yang mempunyai kepentingan mengawal dalam CMP. CMP adalah pemaju projek untuk penambakan tanah ('projek'). CMP menganugerahkan projek itu kepada JDN untuk pembinaannya. Sofidra adalah penjamin yang menjamin kewajipan pelaksanaan kerja yang wajar oleh JDN. Kontrak berkenaan telah dilaksanakan oleh pihak-pihak pada 23 Mac 2010. Kerja-kerja tidak boleh bermula seperti yang dirancang kerana kelewatan CMP dalam memenuhi kewajipan keselamatan kewangan dan pembayaran permulaan. Kerja-kerja hanya bermula pada 8 Oktober 2010 selepas Vincent Tan menyempurnakan perjanjian jaminan dalam kapasiti peribadinya, menjamin kewajipan pelaksanaan kerja yang wajar oleh CMP di bawah kontrak. Menjelang akhir bulan Oktober 2010, CMP sekali lagi gagal membuat pembayaran di bawah kontrak. Malangnya, pada 12 November 2010 sebahagian besar platform yang dipulihkan rosak dan bergerak ke arah selatan yang menyebabkan, antara lain, dalam kehilangan satu nyawa ('bencana RFI'). Pada 16 November 2010, JDN

mengeluarkan notis memberitahu CMP bahawa ia telah gagal dalam perkembangan pembayarannya. CMP gagal untuk meremedi pertikaian. Pada 2 Disember 2010 JDN menamatkan kontrak. Pada 12 Ogos 2011 JDN dan Sofidra meneruskan untuk merujuk pertikaian tersebut kepada timbang tara. Tribunal timbang tara telah ditubuhkan pada 31 Januari 2012 ('tribunal') dan pihak-pihak yang meneruskan prosiding timbang tara. CMP dan Vincent Tan memfailkan tuntutan balas mereka terhadap JDN dalam prosiding timbang tara. Pada 3 September 2015, selepas mendengar pihak-pihak, tribunal menyampaikan award ('award'), dan memutuskan, antara lain, bahawa: (a) JDN telah menamatkan kontrak dengan sah; (b) JDN bertanggungjawab terhadap bencana RFI; (c) JDN dan Sofidra diperintahkan secara bersama dan berasingan untuk membayar CMP sejumlah RM2,789,383.57 berkenaan dengan tuntutan balas CMP dengan faedah 5% dari tarikh award sehingga tarikh pembayaran; dan (d) setiap pihak hendaklah menanggung sama rata semua fi dan perbelanjaan oleh KLRCA dan tribunal timbang tara. Pada 23 Disember 2015, JDN dan Sofidra memfailkan saman pemula di bawah s 37 Akta untuk mengetepikan sebahagian daripada award yang membenarkan tuntutan balas CMP. Selepas mendengar pihak-pihak, Mahkamah Tinggi mengekalkan keputusan tribunal dan menolak permohonan JDN dan Sofidra. Tidak berpuas hati dengan penolakan permohonan mereka, JDN dan Sofidra memfailkan rayuan ke Mahkamah Rayuan. Mahkamah Rayuan menolak rayuan itu dan memutuskan bahawa ia bukan merupakan kes yang wajar dan betul untuk campur tangan kehakiman untuk mengetepikan award di bawah s 37 Akta. Kebenaran untuk merayu kepada Mahkamah Persekutuan telah diberikan kepada JDN dan Sofidra mengenai persoalan sama ada sebagai suatu perkara undang-undang Mahkamah Rayuan adalah betul dalam memutuskan bahawa ujian untuk campur tangan mahkamah di bawah s 37 Akta sebagai 'di mana satu award itu mengalami ketidakadilan paten dan/atau di mana award tersebut adalah secara nyata menyalahi undang-undang dan tidak dapat disangkal'. Isu-isu untuk pertimbangan adalah: (i) sama ada award itu dibuat melebihi bidang kuasa; dan (ii) sama ada award itu melanggar dasar awam dan/atau keadilan semula jadi di bawah s 37(1)(b)(ii) dan s 37(2)(b)(ii) Akta.

Diputuskan, menolak rayuan dan mengesahkan perintah Mahkamah Rayuan:

(1) Tribunal telah menentukan implikasi undang-undang kontrak berkenaan terhadap tanggungjawab JDN, dengan merujuk kepada klausa 7.2(a) syarat kontrak. Hujahan JDN mengenai masalah kelebihan bidang kuasa di bawah s 37(1)(a)(v) Akta tidak berasas (lihat perenggan 42).

(2) Tribunal telah membuat analisa terperinci tentang kewajipan pihak-pihak dari perspektif peruntukan risiko berdasarkan keterangan yang telah tersedia sebelum itu sebelum sampai pada kesimpulan bahwa JDN telah melanggar kewajipannya untuk melaksanakan kerja-kerja

dengan penjagaan dan kemahiran seperti yang dikehendaki di bawah kontrak. Penemuan oleh tribunal tidak bertentangan dan juga tidak bercanggah dengan bukti yang dikemukakan di perbicaraan itu. Pihak-pihak telah mencadangkan semua isu-isu yang relevan dalam pliding masing-masing. Tribunal sememangnya wajar mendapat kesimpulan yang dipertimbangkan selepas mendengar pihak-pihak bahawa JDN telah melanggar kewajipannya di bawah kontrak selepas pemeriksaan terperinci mengenai klausa-klausa yang relevan dalam kontrak di mana pihak-pihak telah membahagikan risiko yang terlibat dalam skop kerja. Aduan yang didakwa oleh JDN gagal memenuhi syarat untuk membuktikan bahawa tribunal telah menjalankan prosiding dan mengeluarkan award itu melanggar peraturan keadilan semula jadi. JDN tidak cukup memperincikan aduan yang terdapat di bawah Akta (lihat perenggan 44–46).

(3) Tiada apa-apa untuk menunjukkan bahawa Mahkamah Rayuan telah menolak rayuan JDN dan Sofidra atas alasan bahawa mereka telah gagal dalam ujian 'ketidakadilan paten' dan/atau 'secara nyata menyalahi undang-undang dan tidak dapat disangkal'. Sebaliknya, rayuan itu telah ditolak oleh Mahkamah Rayuan atas alasan bahawa selepas membaca rekod rayuan dan hujahan peguam yang bijaksana, mahkamah tidak menganggap ia adalah kes yang wajar dan betul untuk campur tangan kehakiman untuk mengetepikan award itu. Mahkamah Rayuan tidak membuat apa-apa keputusan afirmatif untuk menggunakan ujian untuk campur tangan mahkamah di bawah s 37 Akta dan oleh itu mahkamah ini tidak berada dalam kedudukan untuk memberikan jawapan kepada soalan yang dikemukakan (lihat perenggan 67–68).

(4) Hakim Mahkamah Tinggi yang bijaksana telah membuat keputusan yang betul bahawa tribunal itu tidak menyimpang daripada kes yang diplid oleh pihak-pihak dalam hujahan mereka kepada timbang tara dan tidak melampaui hujahan pihak-pihak. Oleh itu, hujahan JDN dan Sofidra mengenai isu di bawah s 37(1)(a)(v) Akta untuk menyokong rayuan mereka telah dengan betul ditolak. Mahkamah Rayuan telah dengan betul mengesahkan keputusan itu. Hakim Mahkamah Tinggi yang bijaksana juga telah dengan betul mendapati JDN dan Sofidra gagal membuktikan kes mereka terhadap pelanggaran keadilan semulajadi dan award yang dibuat oleh award timbangtara itu bertentangan dengan dasar awam Malaysia di bawah s 37(1)(b)(ii) dan 37(2)(b)(ii) Akta (lihat perenggan 69–70).]

Notes

For cases on setting aside, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2021–2107.

Cases referred to

Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd & another appeal [2011] MLJU 1537; [2013] 2 CLJ 395, CA (refd)

Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1; [2018] 1 CLJ 693, FC (not folld)

Kyburn Investments Ltd v Beca Corporate Holdings Ltd [2015] 3 NZLR 644, CA (refd)

Lesotho Highlands Development Authority v Impregilo SpA and others [2005] UKHL 43, HL (refd)

PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR 597, CA (refd)

Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd [2016] 2 MLJ 697; [2016] 3 CLJ 403, CA (folld)

Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd [2018] 3 MLJ 608; [2018] 3 MLRA 219, CA (folld)

Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR 86, CA (refd)

Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd [2009] MLJU 793; [2010] 5 CLJ 83, HC (refd)

Legislation referred to

Arbitration Act 1996 [UK]

Arbitration Act 2005 ss 4, 8, 9, 37, 37(1)(a)(v), (1)(b)(ii), (2), (2)(b), (2)(b)(ii), 39, 42

Appeal from: Civil Appeal No W-02(C)(A)-1400–08 of 2016 (Court of Appeal, Putrajaya)

Rajendra Navaratnam (Raja Kumar, Raja Kandan and Mak Hon Pan with him) (Azman, Davidson & Co) for the appellants.

Kamraj Nayagan (Kent Chai and Dawn Wong with him) (Mah-Kamriyah & Philip Koh) for the respondents.

Ramly Ali FCJ (delivering judgment of the court):

INTRODUCTION

[1] The present appeal (Civil Appeal No 02(f)-7–02 of 2018(W) by the appellants, Jan De Nul (M) Sdn Bhd (JDN) and Jan De Nul Group (Sofidra SA) (Sofidra) is against the decision of the Court of Appeal dated 24 October 2017 dismissing their appeal relating to their application to set aside an arbitral award pursuant to s 37 of the Arbitration Act 2005 ('the AA 2005').

A **[2]** There is another related appeal ie Civil Appeal No 2(f)-8–02 of 2018(W) where the appellants are Tan Sri Dato' Sri Vincent Tan Chee Yioun ('Vincent Tan') and Central Malaysian Properties Sdn Bhd ('CMP').

B **[3]** Both the appeals were heard together, but we will prepare separate judgment for each of them. The present judgment is only in respect of Civil Appeal No 02(f)-7–02 of 2018(W) in relation to the setting aside application under s 37 of the AA 2005 by JDN and Sofidra.

C THE PARTIES

[4] JDN, at all material time, was a private company limited by share, incorporated in Malaysia; and Sofidra, was the ultimate holding company of JDN, incorporated in Luxembourg.

D

[5] CMP, at all material time, was a private company limited by share, incorporated in Malaysia; and Vincent Tan, was a substantial shareholder having a controlling stake in CMP.

E BACKGROUND FACTS

[6] CMP was the developer of a project for reclamation of land comprising of a plot of land measuring 38.11 hectares, along about a 2km stretch of existing shoreline bordering Jalan Abu Bakar and Jalan Skudai in Johor Bahru **F** ('the project').

[7] CMP by a letter of award, awarded the project to JDN for its construction. Sofidra was the guarantor guaranteeing the due performance by JDN of its obligations. The relevant contract was executed by the parties on **G** 23 March 2010. It was based on the Construction Industry Development Board (CIDB) Standard Form of Contract for Building Works — 2000 Edition.

H **[8]** Works could not start as planned due to CMP's delay in meeting its initial financial and payment security obligation. Works only started on 8 October 2010 after Vincent Tan executed a guarantee agreement in his personal capacity, guaranteeing the due and functual performance by CMP of its obligations under the contract.

I

[9] By the end of October 2010, CMP was again in default of payment under the contract for progress claim certificates Nos 5 and 6.

[10] Unfortunately, something disastrous happened at the site on 12 November 2010 where much of the reclaimed platform gave way and moved southwards resulting among other, in the loss of one life ('the RFI disaster'). A

[11] On 16 November 2010, JDN issued a notice notifying CMP that it had defaulted in its payment progress. CMP failed to remedy the default. On 2 December 2010 JDN terminated the contract. B

[12] On 12 August 2011 JDN and Sofidra proceeded to refer the dispute to arbitration. An arbitral tribunal was constituted on 31 January 2012 ('the tribunal') and the parties proceeded with the arbitral proceedings. CMP and Vincent Tan filed their counterclaim against JDN in the arbitral proceedings. C

[13] On 3 September 2015, after hearing the parties, the tribunal delivered an award ('the award'), and held, inter alia, that: D

(a) JDN validly terminated the contract;

(b) JDN was responsible for the RFI disaster;

(c) JDN and Sofidra were ordered jointly and severally to pay CMP the sum of RM2,789,383.57 in respect of CMP's counterclaim with 5% interest from the date of the award until the date of payment; and E

(d) each party shall bear equally all the fees and expenses by the KLRCA and the arbitral tribunal. F

AT THE HIGH COURT

[14] On 15 October 2015, Vincent Tan and CMP filed an originating summons to refer questions of law arising out of the award under s 42 of the AA 2005. JDN and Sofidra also filed an originating summons to refer questions of law under the same section. G

[15] On 23 December 2015, JDN and Sofidra filed another originating summons under s 37 of the same Act to set aside part of the award which allowed CMP's counterclaim on the following grounds: H

(a) that the award was made in excess of jurisdiction in that it contains decision on matters beyond the scope of the submission to arbitration under s 37(1)(a)(v) of the AA 2005; and/or I

(b) that the award was in breach of public policy and/or natural justice under s 37(1)(b)(ii) and 37(2)(b)(ii) of the AA 2005.

[16] JDN's main complaint was that the contract was a conventional contract with no design obligation resting upon JDN; and it was never the pleaded case or contention of the parties nor was any evidence led on the premise that was decided by the tribunal ie staged construction was a design issue, and yet JDN was found to be responsible for the design of the project.

[17] After hearing the parties, the High Court upheld the decision of the tribunal and dismissed JDN's and Sofidra's application under s 37 of the AA 2005 with costs of RM30,000.

[18] The High Court ruled that the tribunal had not acted in excess of jurisdiction and there was no breach of public policy and/or the rule of natural justice in making the award. The High Court found that JDN and Sofidra had failed to prove their case under s 37(1)(a)(v), 37(1)(b)(ii) and/or 37(2)(b) of the AA 2005.

[19] The High Court further ruled that JDN's contention that the tribunal had gone beyond its jurisdiction is baseless, as every opportunity had been given to JDN to present its case in the proceedings. The High Court was of the view that JDN was seeking to take issue with the merit of the tribunal's decision which in effect seeking to appeal against the award to the court, and this was not permitted in a challenge proceedings under s 37 of the AA 2005.

[20] On the issue of public policy, the learned High Court judge had expressed his view that in order for JDN to succeed in a complaint of a breach of public policy, JDN must show that the 'most basic notions of morality and justice would be offended' by the award and the breach is something 'clearly injurious to the public good in Malaysia'.

[21] In his conclusion, the learned High Court judge ruled as follows:

> I am in total agreement with CMP that the complaint leveled by JDN on the public policy ground of a breach of natural justice, even if taken at its highest, does not meet the requirements to prove that the Tribunal had issued an award in breach of public policy. JDN have not sufficiently particularised a complaint for breach of natural justice recognisable under the AA 2005.

AT THE COURT OF APPEAL

[22] Dissatisfied with the dismissal of their application, JDN and Sofidra filed an appeal to the Court of Appeal.

[23] On 24 October 2017, the Court of Appeal dismissed the appeal with costs of RM20,000 and ruled that it was not a fit and proper case for judicial intervention to set aside the award under s 37 of the AA 2005.

[24] The Court of Appeal unanimously affirmed the decision of the High Court. The Court of Appeal expressed its view, inter alia, that 's 37 ground relates to arbitral process. The threshold to satisfy the grounds to be low. However, the court is given discretion not to set aside the award notwithstanding the applicant can establish one or more of the grounds set out in s 37. In considering whether or not to set aside the award, the court is obliged to look at other provisions of the Act and take a holistic approach as far as practical to sustain the award'.

[25] The Court of Appeal elaborated:

> The court's role is to ensure substantive integrity of the arbitral process is maintained at all stages. Trivial complaints framed as excess of jurisdiction related to the manner the arbitral tribunal had handled the issues which arose from the substantive contract having the arbitration clause should not be much of a concern for the court in the regime of party autonomy concept. Only violent breaches on the face of record which compromise the integrity of the decision making process should be the cause of concern for the courts.

[26] The Court of Appeal further expressed its view that 'it is now well settled that in Malaysia, the arbitrator's award is final, binding and conclusive and can only be challenged in exceptional circumstances'.

AT THE FEDERAL COURT

[27] Leave to appeal to the Federal Court was granted to JDN and Sofidra on the following question, namely:

> Whether as a matter of law the Court of Appeal is correct in ruling that the test for the intervention of the court under s 37 of the Arbitration Act 2005 as 'one where the award suffer from patent injustice and/or where the award is manifestly unlawful and unconscionable', bearing in mind that:
>
> (i) the same cannot be found in the language of s 37 of the Arbitration Act 2005;
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> (ii) the same are not derived from any jurisprudence of the Model Law; and
>
> (iii) the same have been rejected by the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang & 2 Other Appeals* [Federal Court Civil Appeal No 02–19–047 of 2015 & other appeals] as the test for intervention under s 42 of the Arbitration Act 2005.

SUBMISSIONS BY COUNSEL FOR JDN AND SOFIDRA

[28] Learned counsel for JDN and Sofidra submitted that the test of 'patent injustice' or 'manifestly unlawful or unconscionable' as applied by the High

Court and the Court of Appeal was the wrong test for intervention under s 37 of the AA 2005 as the same cannot be found in the language of the section itself. By applying the said test, the Court of Appeal had imposed an additional requirement and had set an unreasonably high threshold before the court can intervene in the arbitral award.

[29] Learned counsel argued that the proper test to be applied for intervention by the court under s 37 of the AA 2005 should be derived from the language or wordings of the section itself listing out the possible grounds for intervention and guided perhaps by the jurisprudence in relation to article 34 of the Model Law which s 37 of the AA 2005 is based upon.

[30] Learned counsel further submitted that once the grounds are established, it is then for the court to decide whether or not to exercise its discretion to set aside the arbitral award based on the circumstances of the case. There is no requirement that the award must suffer from 'patent injustice' or is 'manifestly unlawful and unconscionable' before the court may intervene. Thus, it was submitted that the question posed ought to be answered that the Court of Appeal was wrong in determining that the test for intervention of the court under s 37 of the AA 2005 is one where the award suffers from 'patent injustice' or where the award is 'manifestly unlawful and unconscionable'; and therefore, based on the proper test to be adopted in respect of s 37 of the AA 2005, the award delivered by the tribunal ought to be set aside.

SUBMISSIONS BY COUNSEL FOR CMP AND VINCENT TAN

[31] Learned counsel for Vincent Tan and CMP, on the other hand, submitted that an arbitration award is final and can only be challenged in exceptional circumstances as the AA 2005 and the UNCITRAL Model Law require recognition of party's autonomy and minimal intervention by the court; and the court does not exercise an appellate jurisdiction over arbitration awards.

[32] Learned counsel also submitted that s 37 of the AA 2005, which has its equivalent in article 34 of the UNCITRAL Model Law on International Commercial Arbitration and article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, uses the word 'may' as opposed to the word 'shall'; and thus, it is evident that the court is vested with discretion to intervene and the discretion must be exercised judiciously guided by the best practices under the UNCITRAL Model Law regime and must also be subject to any other specific requirements of the AA 2005 itself.

[33] Learned counsel further submitted that JDN's and Sofidra's contention that the tribunal had acted in excess of jurisdiction is clearly devoid of merit as neither JDN nor Sofidra were deprived of their rights to submit on the issues of design and conventional contracts; and there was also no breach of the rules of natural justice throughout the arbitration proceedings.

[34] On the issue of public policy, learned counsel pointed out that JDN and Sofidra had failed to specify in what way the award was in breach of the rules of natural justice that was deemed to be contrary to the public policy of Malaysia. JDN and Sofidra had also failed to identify any procedural illegality that resulted in a substantial miscarriage of justice to them.

OUR DECISION

[35] The main thrust of the present appeal by JDN and Sofidra is two-fold:

(a) that the award was made in excess of jurisdiction in that it contains decisions on matters not submitted to them for arbitration or beyond the scope of the submissions to arbitration under s 37(1)(a)(v) of the AA 2005, (excess of jurisdiction issue); and

(b) that the tribunal did not or had failed to provide an opportunity to be heard for the parties to submit on the basis upon which the tribunal had decided the case, thereby breaching the rules of natural justice which is an instance that the award may be contrary to the public policy of Malaysia (natural justice/public policy issue).

[36] With regard to the excess of jurisdiction issue, JDN and Sofidra contended that the basis upon which the arbitral tribunal had decided the case was never 'in play' and was based on its 'own idea'. This constituted a 'new difference' between the parties and the award consequently ought to be set aside. They claimed that the arbitrator had gone on a frolic of its own and decided the case based on an argued question of law, question of construction of the contract and question of fact without first according an opportunity for the parties to submit on the issue. It was submitted that the tribunal's decision that JDN was responsible for the reclamation-failure-incident (the RFI disaster), notwithstanding that the tribunal had found as a fact that the staged construction was a design method, has disregarded the parties' pleaded case, contentions and the manner in which the case was represented as well as the evidence led during the arbitral proceedings.

[37] The pleaded case of JDN and Sofidra was that the contract between JDN and CMP was a conventional contract where JDN builds to CMP's design; the need for ground improvement, via staged construction, is an issue

of design and needed to be specified and communicated; where JDN was not responsible for such design by reason of cl 7.2(a) of the contract.

[38] CMP's and Vincent Tan's pleaded case was that the ground improvement, via staged construction, constituted a method of construction which was left to be determined by JDN and the reclamation-failure-incident ('the RFI disaster') was caused by JDN purportedly not following the method statement/work programmed as stipulated in the contract.

[39] JDN and Sofidra contended that the parties' pleaded case in the arbitration proceedings was merely that of a contest between 'design' and 'method of construction'. JDN and Sofidra claimed that the basis of the decision of the tribunal that although staged construction was a 'design' issue, JDN nevertheless bore the responsibility to carry out the same was never put forth by the parties; and that finding constituted a 'new difference' between the parties.

[40] The High Court held that JDN's complaint did not meet the high standard of the tribunal having made a determination on a 'new difference' that was outside the scope of the submission to arbitration; thus the complaint did not amount to a 'new difference'.

[41] The learned judge was of the view that CMP's pleaded case clearly relates to a dispute of whether JDN had breached its contractual obligations in causing the reclamation-failure-incident (the RFI disaster). The learned judge agreed with CMP that the contract was before the tribunal; and therefore the tribunal was entitled, and in fact was incumbent, to take cognisance of the contract as a whole and accordingly to determine the parties' respective obligations under it. The learned judge further said:

> Howsoever the isolated issue of whether 'staged construction is a design issue' is answered, it does not detract the Tribunal from having to determine the overarching issue of whether JDN had breached its Contractual obligations in causing the RFI. With that this court agrees.

[42] We agree with the learned judge that the tribunal had determined the legal implication of the contract on JDN's responsibilities, with particular reference to cl 7.2(a) of the conditions of contract. We also agree with the learned judge in his conclusion on the issue that 'I fail to see, in the light of the above how the Tribunal could be said to have strayed from the pleaded case and had gone beyond the submission of the parties to the arbitration'. We would also come to the same conclusion (as made by the High Court and affirmed by the Court of Appeal) that JDN's contention on this issue of excess of jurisdiction under s 37(1)(a)(v) of the AA 2005 was baseless.

[43] On the issue of a breach of the rules of natural justice, JDN and Sofidra alleged that the tribunal had decided the case on a basis not raised or contemplated by the parties in the arbitration ie that JDN was responsible under the contract to carry out staged construction and/or ground treatment even though it was found to be a design issue; and therefore the tribunal had summarily dismissed, without notice, the contentions of the parties' pleaded case and/or the evidence led in the arbitration hearings as unhelpful; and that the tribunal, without notice, denied them an opportunity to be heard and/or a fair opportunity to present their case on the issue upon which the arbitration was decided.

[44] After reading the records and documents relating to the arbitral proceedings before the tribunal, we share the same view with the learned High Court judge that in the present case the tribunal had made a detailed analysis of the parties' obligations from the perspective of risk allocation based on the evidence made available before it before coming to the conclusion that JDN had breached its obligations to execute the works with due care and skill as required under the contract. That finding by the tribunal was neither contrary to nor did inconsistent with the evidence adduce at the hearing.

[45] In the present case, we are satisfied that the parties had sufficiently raised all the relevant issues in their respective pleadings. The tribunal was certainly entitled to come to its considered conclusion after hearing the parties that JDN had breached its obligations under the contract after detailed examination of the relevant clauses in the contract where the parties have apportioned the risks involved in the scope of the works.

[46] The learned High Court judge had given clear explanation to support his finding that the complaint as alleged by JDN has failed to meet the requirements to prove that the tribunal had conducted the proceedings and issued the award in breach of the rules of natural justice. The learned judge had correctly ruled that JDN had not sufficiently particularised the complaint recognisable under the AA 2005. At para [166] of the judgment, the learned judge explained as follows:

> It must be noted that in the present case the tribunal had given every opportunity to both CMP and JDN to present evidence and make representations on all issues that arose for determination. The parties had filed a total of nine expert reports with voluminous exhibits attached. The parties also proceeded to two joint expert reports; one on the issue of quantum and the other on the geotechnical issues regarding the RFI. As pointed out by Mr Malik Imtiaz, the parties had submitted a total of 12 written submissions in 895 pages, JDN had applied for permission to put in further submissions beyond the directions of the tribunal and the tribunal allowed the application and directed parties to file in their respective further submissions. On top of that, after the close of the evidentiary hearing, JDN made

A an application to the tribunal to adduce new documents. Though CMP objected, the tribunal allowed JDN to adduce further evidence after the close of the evidentiary hearing.

B **[47]** The issue of a breach of public policy of Malaysia was also raised by the parties in the proceedings before the High Court judge. JDN and Sofidra complained that the award delivered by the tribunal was in conflict with the public policy of Malaysia and/or the rules of natural justice under s 37(1)(b)(ii) and s 37(2)(b)(ii) of the AA 2005.

C **[48]** Under s 37(1)(b)(ii) of the AA 2005, an award may be set aside by the High Court, if the High Court finds that the award is in conflict with the public policy of Malaysia. Under s 37(2)(b)(ii) an award is said to be in conflict with the public policy of Malaysia where a breach of the rules of natural justice occurred in connection with the making of the award.

D

[49] The term 'public policy' is not defined in the AA 2005. However, the term appears in three different sections, namely of ss 4, 37 and 39 of the AA 2005. As commonly used, the term 'public policy' signifies some matter which concerns public good and public interest. It is a fundamental principle of justice in substantive and procedural aspects.

E

[50] The High Court judge expressed his view that in order for JDN to succeed in its complaint that the award was in conflict with the public policy of Malaysia, JDN must show that the most basic notions of morality and justice would be offended by the award and that the conflict is something clearly injurious to the public good in Malaysia.

F

G **[51]** *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) had highlighted the term 'public policy' as follows: 'In discussing the term 'public policy, it was understood that it was not equivalent to the political stance or international policies of a state but comprised the fundamental notions and principles of justice. It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects'.

H

I **[52]** The term 'public policy' as appears in s 37(1)(b)(ii) of the AA 2005 covers a scope of 'public policy' elements as used generally. However, in s 37(2)(b)(ii) the scope is more specific. It specifically categorises a breach of the rules of natural justice which occurred in connection with the making of an award as being in conflict with the public policy of Malaysia.

[53] The decision of the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597, provides a good guidance on the interpretation of the term 'public policy' in an application to set aside an arbitral award made by a tribunal, on the ground of a breach of the rule of natural justice for being in conflict with the public policy. In that case Chan Sek Keong CJ (delivering the judgment of the court) ruled:

> Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would 'shock the conscience' (see Downer Connect (58) at (136), or is 'clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public' (see *Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyds Rep 246 at 254, per Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see *Parsons & Whittemore Overseas Co Inc v. Societe Generalede L'Industrie du Papier (RAKTA)* 508 F 2d 969 (second Cir, 1974) at 974.

[54] In a recent case of *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd* [2018] 3 MLJ 608; [2018] 3 MLRA 219, the Court of Appeal held, inter alia, that a breach of the rules of natural justice that occurred in an arbitral proceedings which has a real and substantial impact on the outcome of the arbitration and the eventual award rendered, is plainly said to be in conflict with the public policy of Malaysia.

[55] Section 37(2)(b)(ii) of the AA 2005 provides that an award made by an arbitral tribunal would be in conflict with the public policy of Malaysia if a breach of the rules of natural justice occurred in connection with the making of the award. The circumstances stated in s 37(2) are by no means exhaustive. Other appropriate circumstances may also fall under the category of 'public policy' in view of the opening phrase 'without limiting the generality of sub-para (1)(b)(ii)' as appears in s 37(2) of the AA 2005. However, it must be appreciated that the concept of public policy generally is itself a broad concept. But in applying the concept for the purpose of setting aside an award under s 37 of the AA 2005, the concept of public policy ought to be read narrowly and more restrictively. The court's intervention should be sparingly used. The court must be compelled that a strong case has been made out that the arbitral award conflicts with the public policy of Malaysia. As clearly stated by the Court of Appeal in *Sigur Ros* (with which we agree): 'The concept of public policy must be one taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused'.

[56] Even though the court finds that a breach of the rules of natural justice has been established or that an arbitral award is in conflict with the public policy under s 37 of the AA 2005, it does not necessarily mean that the award must be set aside as a matter of course. The power of the court to set aside an award under s 37 is discretionary and will not be exercised automatically in every case where the complaints are established (see: *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] 3 NZLR 644; *Sigur Ros Sdn Bhd*).

[57] The court must evaluate the nature and impact of the particular breach in deciding whether the award should be set aside under s 37. The court must also consider the background policy of encouraging arbitral finality and minimalist intervention approach to be adopted in line with the spirit of UNCITRAL Model Law. The effect of ss 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote one-stop adjudication in line with the international practice (see: *Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd & another appeal* [2011] MLJU 1537; [2013] 2 CLJ 395; *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83; and *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43). In this regard, the court needs to recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined.

[58] The scope of public policy ground for setting aside an arbitral award could only be invoked in deserving case ie in instances where it appears a violation of the most basic notions of morality and justice. It covers fundamental principles of law and justice in substantive as well as procedural respect. Instances where the upholding of an arbitral award would shock the conscience, or clearly injurious to the public good, or wholly offensive to the ordinary reasonable and fully informed member of the public, had been held by courts in various jurisdiction to fall within the category of public policy ground for setting aside an arbitral award. Thus, instances such as 'patent injustice', 'manifestly unlawful and unconscionable', substantial injustice', 'serious irregularity' and other similar serious flaws in the arbitral process and award, would also fall within the applicable concept of public policy and therefore by virtue of s 37(1)(b)(ii) of the AA 2005 when proven, can be a ground for the court to exercise its discretion to set aside the award (see: *Ajwa for Food Industries*). Such instances fall within 'the basic and fundamental notions or principles of justice'. The court must adopt the principle as laid down by Howard M Holtzmann and Joseph E Neuhans as found in their commentary in *A guide to the UNCITRAL Model on International Commercial Arbitration: Legislative History and Commentary* 'that the term 'public policy'

which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects'. The terms 'patent injustice' or 'substantial injustice' or 'manifestly unlawful and unconscionable' as often used by the court in setting aside arbitral awards, do not mean injustice which is more than de minimis; what is required is that the injustice had real effect and had prejudiced the basic right of the applicant (see: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86).

[59] In relation to the question posed before us, JDN's and Sofidra's main complaint was that the Court of Appeal had erred in ruling that the test for intervention under s 37 of the AA 2005 as 'one where the award suffers from patent injustice and/or where the award is manifestly unlawful and unconscionable' as the said test has no basis in law and had set an unreasonably high threshold before the court could exercise its discretion for intervention.

[60] Before we deal with question posed, it is necessary to first establish whether the Court of Appeal had in fact, made such a ruling in its judgment in dismissing JDN's and Sofidra's appeal. We have to peruse the judgment of the Court of Appeal first. If it is established as a matter of fact, that such ruling was actually made by the Court of Appeal in its judgment, then we will accordingly deal with and answer the question posed. If the Court of Appeal in fact had not made such ruling, then the question posed would be highly hypothetical and we will not be able to give an appropriate answer as to whether the Court of Appeal erred or not; or our answer given would be purely academic and does not help in the determination of the appeal before us.

[61] JDN and Sofidra contended that the Court of Appeal, at para 8 of its judgment had set out that the test for both ss 37 and 42 of the AA 2005 as one 'where the award suffer from patent injustice and/or where the award is manifestly unlawful and unconscionable'.

[62] CMP and Vincent Tan on the other hand, argued that the Court of Appeal did not set out the test for intervention under s 37 of the AA 2005 as alleged. The said test for intervention as cited by the Court of Appeal in its judgment refers to a decision in another case, namely, *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697; [2016] 3 CLJ 403, relating to a reference on questions of law under s 42 of the AA 2005. It is not for an application to set aside an award under s 37 of the AA 2005.

[63] In order to appreciate the issue, it is helpful to have sight of para 8 of the Court of Appeal's judgment:

> [8] Appreciating the distinction in our ss 37 and 42 AA 2005 in relation to EAA 1996, the Court of Appeal in *Petronas Penapisan*, had in simple terms advocated

> that the test for intervention will be related to one where the award suffer from patent injustice and/or where the award is manifestly unlawful and unconscionable. Parading English judgments in submissions or cases relating to ss 37 or 42 in actual fact have no jurisprudential utility. The test in England can be said to be one related to low threshold to intervene and in Malaysia the legislation has placed a high threshold for intervention. Though the threshold to satisfy the ground state in s 37 may be low ...

[64] We have read the whole judgment of the Court of Appeal. We found that the only part of the judgment where the words 'patent injustice' and 'manifestly unlawful and unconscionable' were mentioned, was in para 8 thereof. From the plain reading of that paragraph we cannot find any clear finding or determination by the Court of Appeal that the said test was accepted and applied to the facts and circumstances of the present case. The Court of Appeal cited the passage from another case of *Petronas Penapisan* in appreciating the distinction between our ss 37 and 42 of the AA 2005 in relation of the English Arbitration Act 1996 ('the EAA 1996'). The said passage was in relation to the provision of s 42 and not s 37 of the AA 2005. Both these sections relate to different purposes and different tests for consideration. They are not the same. The consideration by the court in dealing with the applications under the sections varies. The cited test applicable in establishing an application under the s 42 may not be the same with and not applicable to an application under s 37 of the Act.

[65] In drawing a clear distinction between ss 37 and 42 of the AA 2005, the Court of Appeal in *Petronas Penapisan*, made the following observation (with which we agree):

> An application to set aside an award under s 37 largely deals with issues relating to the award making process and has nothing to do with error of facts and/or law on the face of record unless the exception applies; such as public policy. An application under s 42 has nothing to do with the award making process but has everything to do with the award per se and error of law on the face of record which error substantially affects the rights of one or more of the parties. The distinction between ss 37 and 42 is that like of an apple and an orange.

[66] For that matter, even the recent decision of this court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693 which CMP claimed had rejected the tests of 'patent injustice' and 'manifestly unlawful and unconscionable', to our understanding, was only applicable to an application under s 42 of the AA 2005 (which was the subject matter of that case) and hence, was not applicable to the present appeal which is based on s 37 of the Act.

[67] In the present case, there was nothing to show that the Court of Appeal

had dismissed JDN's and Sofidra's appeal on the ground that they have failed in the test of 'patent injustice' and/or 'manifestly unlawful and unconscionable'. Instead, the appeal was dismissed by the Court of Appeal on the ground that after reading the appeal records and submissions of learned counsels, the court did not think it was a fit and proper case for judicial intervention to set aside the award.

[68] On the above reasoning, we are more inclined to hold that the Court of Appeal had not made any affirmative ruling to apply the test for intervention of the court under s 37 of the AA 2005 as stated in the leave question posed before us. We are therefore not in the position to give an answer to the question posed.

CONCLUSION

[69] For the reasons elaborated above it is our view that the learned High Court judge had made a correct finding that the tribunal had not strayed from the pleaded case of the parties in their submissions to the arbitration and had not gone beyond the submissions of the parties. Therefore JDN's and Sofidra's contentions on this issue under s 37(1)(a)(v) of the AA 2005 to support their appeal was correctly dismissed. The Court of Appeal had correctly affirmed the decision.

[70] The learned High Court judge had also correctly found, (and correctly affirmed by the Court of Appeal) that on the facts and circumstances of the case, that JDN and Sofidra had failed to establish their case on a breach of natural justice and that the award made by the arbitral award was in conflict with the public policy of Malaysia under s 37(1)(b)(ii) and 37(2)(b)(ii) of the AA 2005. Therefore their appeal on this issue must also fall.

[71] In the upshot, we dismiss the appeal Civil Appeal No 02(f)-7–02 of 2018 (W) with costs. We affirm the decision of the courts below.

Appeal dismissed and order of Court of Appeal affirmed.

Reported by Nabilah Syahida Abdullah Salleh